IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. _____

GEORGE L. MOORE,

Petitioner,

v.

THE BOARD OF TRUSTEES OF CARSON-TAHOE HOSPITAL, a Public Hospital, and WILLIAM E. SCHULTZ, WILLIAM A. YOUNG, L. GENE GOLD, JOSEPH N. LITTLEFIELD, MARY O. KNAPP, and WILLIAM R. KING, constituting the members of said Board.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

Charles E. Springer
333 Flint Street
Reno, Nevada 89501

Counsel for Petitioner

July 31, 1972

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PETITION FOR A WRIT OF CERTIORARI
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THE STATE OF NEVADA

The petitioner, GEORGE L. MOORE, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Nevada rendered in these proceedings on April 6, 1972 and made effective by order of the Supreme Court of Nevada on May 3, 1972.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Nevada is reported at 88 Nevada Advance Opinion 55, 495 P.2d 605 (1972) and appears at Appendix A, infra, pp. i - xiv. The opinion of the First Judicial District Court of the State of Nevada is unreported, and appears at Appendix B, infra, pp. xv - xix. The decision of the Board of Trustees of Carson-Tahoe Hospital is unreported and appears at Appendix C, infra, pp. xx - xxxiv.

JURISDICTION

The order or judgment of the Supreme Court of the State of Nevada became effective on May 3, 1972. See Appendix F, infra, xliv - xlv. This

petition for certiorari was filed less than 90 days from the date aforesaid.

The federal question was raised as indicated in the Opinion of the Supreme Court of the State of Nevada as appears at Appendix A, infra.

A timely petition for rehearing was denied on May 3, 1972, three days after its filing as appears at Appendix F, infra, pp. xliv-xlv.

The jurisdiction of this Court is invoked under 28 U.S.C. and § 1257 (3).

QUESTIONS PRESENTED

The Board of Trustees of Carson-Tahoe Hospital, a county public hospital, revoked the medical staff privileges of the petitioner, a duly licensed and qualified physician and surgeon on the basis that two incidents, one involving the failure to wear rubber gloves while administering an anesthetic, and the other involving petitioner's acquiescence in the suggestion by two other doctors that he should postpone a scheduled surgery constituted "unprofessional conduct." While the hospital bylaws authorized termination of staff privileges for "unprofessional conduct", nowhere either in the bylaws or elsewhere was the term "unprofessional conduct" defined, explained, amplified, or otherwise mentioned. Under the circumstances,

was the petitioner deprived of rights protected by the Due Process Clause of the Fourteenth Amendment:

1. In that he was excluded from the only hospital in the area where he maintained his practice under a bylaw provision which was so indefinite and vague, as to afford no ascertainable standard of conduct or medical practice requiring those affected to guess at its meaning and differ as to its application;

2. In that he was excluded from the hospital and thus the bulk of his medical practice on a record barren of any evidence of danger or harm to his patients or the hospital or of willful violation of any bylaw, rule, regulation, or necessary medical procedure.

3. In that his medical staff privileges were taken away for actions which have no rational connection with his fitness or capacity to practice medicine in the hospital.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> "nor shall any state deprive any person of life, liberty, or property, without due process

of law."

The applicable bylaw provision under which petitioner was removed from the medical staff provides as follows:

(Article 4)

"Section 5: Review of Privileges. A member of the Medical Staff who violates any rule, or who is guilty of unprofessional conduct, may have his privileges reviewed (,) altered or rescinded by the Board of Trustees on recommendation of the Medical Staff, such action being initiated by the Executive-Credentials Committee, and recommendations made by the Medical Staff."

This case further involves Nevada Revised Statutes 630.030. This is reprinted in Appendix D, infra, pp. xxxv - xxxvii.

STATEMENT OF FACTS

The facts relevant to the question presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

Plaintiff is a physician and surgeon duly licensed by the State of Nevada, certified by the American Board

of Obstetrics and Gynecology and a Fellow of the American College of Surgeons and of the American College of Obstetricians and Gynecologists.

He taught obstetrics and gynecology at Baylor Medical School and practiced in Houston, Texas prior to his moving to Carson City in 1965. He has practiced medicine, specializing in obstetrics and gynecology, since 1965 and has been a full member of the active medical staff at Carson-Tahoe Hospital since that time.

On July 31, 1969, the Board of Trustees of Carson-Tahoe Hospital terminated the right of plaintiff to practice in Carson-Tahoe Hospital, a public hospital, and the only hospital in Carson City, Nevada or in the immediate vicinity.

Plaintiff then instituted legal proceedings and his right to practice was reinstated by the First Judicial District Court of the State of Nevada until such time as formal charges were filed against him and he was given an opportunity to defend himself before the Board.

Thereafter, plaintiff was charged, by registered letter, with 12 different alleged violations, occurring between the years 1965 through 1969, alleged to be "unprofessional conduct".

A hearing was ultimately

held on the merits concerning these charges, resulting in ten of the charges being dropped for lack of proof. However, the Board found evidence that appeared to substantiate two of the charges, to wit: failure to use rubber gloves, on July 26, 1969, and abiding by the judgment of Drs. King and Hines that he should not perform surgery on July 28, 1969.

The Board, on February 19, 1970, by a vote of 3 - 2, decided to terminate Dr. Moore's staff privileges on grounds of "unprofessional Conduct" based upon the two incidents. (Appendix C, infra, pp. xx-xxxiv.

While the bylaws of the hospital do allow removal from the medical staff for "unprofessional conduct", the term "unprofessional conduct" is nowhere defined or explained in the said bylaws.

Two members of the Board of Trustees joined in a dissent as appears at Appendix C, infra, pp. xxxi - xxxiv.

Plaintiff subsequently filed in the State District Court an application for a Writ of Mandate and for a temporary restraining order. By stipulation of the parties, this matter was submitted on the record, together with briefs. The trial court denied the writ and injunctive relief and from that order plaintiff filed an appeal with the Nevada Supreme Court, which

entered an order staying execution of the order of the Board of Trustees pending the appeal.

On April 6, 1972 the Nevada Supreme Court filed its opinion affirming by a vote of 3 - 2, the judgment of the trial court. On May 3, 1972, the Nevada Supreme Court entered its order denying rehearing, vacating its stay order, and issuing the remittitur.

The federal questions raised here were presented to the First Judicial District Court by pleading such question in the original complaint for injunctive relief prior to hearing as appears in pertinent part in Appendix E, infra, pp. xl - xli, and in the petition for a Writ of Mandate filed after hearing, as appears in pertinent part in Appendix E, infra, p. xlii, and in the legal issues presented in the briefs to the District Court as appear in Appendix E, infra, p. xliii. The judgment of that court made conclusions of law ruling upon the constitutional questions as appears in Appendix B, infra, pp. xv - xviii, paragraphs 2, 3 and 4.

Similarly, the federal questions were raised in the Nevada Supreme Court by specification of legal issues presented in Dr. Moore's Opening Brief, as appears in Appendix E, infra, pp. xxxviii - xl. The opinion of the Nevada Supreme Court clearly reflects a

specific ruling on these issues, and the dissent is based upon such substantial federal due process questions as appears in Appendix A, infra, pp. i - xiv.

REASONS FOR GRANTING THE WRIT

A. Petitioner has virtually been excluded from the practice of medicine under a bylaw provision of a public hospital which on its face and as applied to petitioner is so vague, indefinite, and uncertain as to offend the due process clause of the Fourteenth Amendment as construed in applicable decisions of this Court.

The charges against petitioner accused petitioner of having been guilty of unprofessional conduct. The Board of Trustees of Carson-Tahoe Hospital found that petitioner did not wear rubber gloves while administering an anesthetic as is the usual practice and that petitioner postponed scheduled surgery voluntarily upon the suggestion of two of his associates that he was in no physical condition to immediately proceed. These two incidents, in the opinion of three members of the Board, constituted "unprofessional conduct" and justification to revoke all staff privileges of petitioner.

As has been stated in the preceding section of this petition, no definition or amplification of the term

"unprofessional conduct" is to be found in the hospital bylaws. The only other application of such a standard in the State of Nevada can be found in NRS 630.030, as appears in Appendix D, infra, pp. xxxv - xxxvii, and in Boswell v. Board of Medical Examiners, 72 Nev. 20, 293 P.2d 424 (1956). However, the courts below refused to apply the statutory definition but instead held that the term "unprofessional conduct" was a sufficiently objective standard. While the legislature of the State deemed it essential to define "unprofessional conduct" to guard against discriminatory action by the Board of Medical Examiners, the Nevada Supreme Court has found that such a definition is not essential to protect a hospital staff member from arbitrary conduct by a hospital governing body. But the Board of Trustees is clothed with almost unlimited power, susceptible of abuse.

In this case, as in Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239, 77 S. Ct. 752, 1 L.Ed. 796 (1957), an arbitrary standard has been applied to exclude a person from the practice of his profession. In this case, as in Schware, the application of such a standard contravenes the Due Process Clause.

The term "unprofessional conduct", much like the term "good moral character", ". . . by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways

for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice . . ." Konigsberg v. State Bar, 353 U.S. 252, 262-263, 77 S. Ct. 722, 1 L. Ed. 810 (1957).

The standard established by the decision of the Nevada Supreme Court only emphasizes the potential abuse and ad hoc application of such a vague standard as "unprofessional conduct". To allow a standard for revocation to be established after the fact by three witnesses as the Nevada Supreme Court accepts, is prima facie contradictory to the previous dictates of this Court that our Constitution cannot allow a State to require conduct in such terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Baggett v. Bullitt, 377 U.S. 360 (1963); Connally v. General Construction Co., 269 U.S. 385; Lanzett v. New Jersey, 306 U.S. 451; United States v. Cardiff, 344 U.S. 174; Champlin Refining Co. v. Corporation Comm'n of Oklahoma, 286 U.S. 210.

The real unfairness and potential danger of the undefined standard of "unprofessional conduct" as applied by the Nevada Supreme Court is

that every physician is forced to abandon his own medical judgment in favor of conformity, for if three witnesses testify that any medical procedure is a deviation from the normal practice, a prima facie case of "unprofessional conduct" has been proven justifying termination of hospital privileges.

Similarly, under the Nevada Supreme Court test, any two physicians can tell a surgeon that he shouldn't perform surgery because of his physical condition, and regardless of whether the surgeon acquiesces in that judgment or not, he, per se, is guilty of "unprofessional conduct", justifying loss of all hospital privileges.

B. The decision below affirms the expulsion of a qualified physician from the hospital staff based upon no evidence of harm, damage, wrongdoing, or violation of any rule, regulation or bylaw and conflicts with this Court's decision in Thompson v. City of Louisville, 362 U.S. 199.

The findings of the hospital Board of Trustees amply demonstrate the evidence of "guilt" regarding petitioner's non-use of rubber gloves:

> ". . . the very fact that the procedure used by Dr. Moore in this situation was different than he or any other Doctor on this staff has ever used is evidence

enough that Dr. Moore was in error."

Similarly, the evidence supporting the inability to perform surgery is fairly stated in the same findings:

"Evidence clearly indicated that Dr. George Moore appeared at the hospital to perform surgery when he was in no condition to do it. This Dr. Moore admitted to himself when he abided by the decision of his fellow doctors without comment. Had Dr. Moore not been refrained from doing surgery he probably would have gone ahead. There naturally can be no evidence to indicate what might have happened. Evidence is ample in this situation to support and sustain the charge."

If the evidence does not support the charge of "unprofessional conduct", even assuming a broad definition of that standard, a revocation of staff privileges is void as a denial of due process. Thompson v. City of Louisville, 362 U.S. 199 (1959).

Enormous conclusions were injected into the findings of the Board, however. Despite the fact that the procedure performed without rubber gloves was completely without injury to the patient, the majority of the Board equated a deviation from the usual to error. And despite the complete

cooperation of the petitioner with his fellow doctors, an explanation of his physical condition, and the agreement by all three doctors for a rescheduling of the surgery for the same day, the majority of the Board engaged in speculation as to results of the unperformed surgery to find error.

Since there is no evidence beyond differing medical judgment and full cooperation, the record is barren of any evidence of culpability or "unprofessional conduct". It is a violation of due process to judge and deprive a physician of his profession without evidence of any act which caused injury to a patient or cast dishonor upon the profession. Schware v. Board of Bar Examiners, supra, at 239.

C. The acts found by the Board of Trustees to be the basis for termination of hospital staff privileges have no rational connection with petitioner's fitness or capacity to practice medicine in the hospital.

Just as a qualification for admission to the bar must have a rational connection with an applicant's fitness or capacity to practice law, qualifications or standards to be admitted or to continue the practice of medicine must have the same rational connections. Schware v. Board of Bar Examiners, supra, at 239.

The use of an unusual medical procedure with success or abiding by a decision of fellow doctors cannot have a rational connection to petitioner's fitness or capacity to practice medicine.

D. The issues presented here, and particularly the interpretation of the standard of "unprofessional conduct" have been and continue to be a constant source of litigation in need of clarification by this Court.

The cases are legion involving admission to or termination from hospital medical staffs. See generally The Physician's Right to Hospital Staff Membership: The Public-Private Dichotomy, 1966 Wash. Univ. Law Q, 485 (1966); Horty, II Hospital Law Manual, Medical Staff, pp. 1-19; Southwick, Hospital Medical Staff Privileges, 18 DePaul L. Rev. 655 (1969).

Litigation has arisen both in state courts and in Federal Courts under the Civil Rights Act. See Citta v. Delaware Valley Hospital, 313 F. Supp. 301 (D.C.E.D. Pa. 1970); Mizell v. North Broward Hospital District, 392 F.2d 580 (5th Cir. 1968), and 427 F.2d 468 (5th Cir. 1970); Meredith v. Allen County War Memorial Hospital Commission, 397 F.2d 33 (6th Cir. 1968).

The questions presented here are of significant importance and have never been before ruled upon by this

Court. Substantial guidance to both state and Federal courts would result by consideration of these issues at this time.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari be granted.

Respectfully submitted,

CHARLES E. SPRINGER
333 Flint Street
Reno, Nevada 89501

Counsel for Petitioner.

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF NEVADA

GEORGE L. MOORE, Appellant, vs. THE BOARD OF TRUSTEES OF CARSON-TAHOE HOSPITAL, a Public Hospital, and WILLIAM SCHULTZ, WILLIAM YOUNG, GENE GOLD, JOSEPH LITTLEFIELD, and MARY GIALY, constituting the members of said Board, Respondents.	No. 6684

Appeal from order of the First Judicial District Court, Carson City; Richard L. Waters, Jr., Judge.

Affirmed.

Carl F. Martillaro, of Carson City, for Appellant.

Michael E. Fondi, District Attorney, and Laxalt, Berry & Allison, of Carson City, for Respondents.

OPINION

By the Court, MOWBRAY, J.:

The appellant, George L. Moore, is a doctor of medicine and is licensed to practice in the State of Nevada. He also enjoyed medical staff privileges at the Carson-Tahoe Hospital until they were terminated on February 19, 1970, by action of the Hospital Board of Trustees. Doctor Moore filed a petition in the district court seeking a writ of mandate in an effort to force the Board to restore his medical staff privileges. The district judge denied his request and hence this appeal.

The issues presented for our consideration may be summarized under two headings: (1) Is the action of a governing board of a public hospital arbitrary, capricious, and unreasonable when it terminates the medical staff privileges of a physician on the grounds of unprofessional conduct, where the acts constituting the conduct complained of are not expressly defined and prohibited in the bylaws, rules, and regulations promulgated by the hospital? (2) Is there sufficient evidence in this case to support the findings of the Board?

1. Doctor Moore was charged with 12 alleged acts of unprofessional conduct, and he was found guilty of Charges Nos. 7 and 11 of the complaint.

Those charges read as follows:

"7. On or about July 26, 1969, you attempted to administer to an O.B. patient, ready to deliver a baby, a spinal anesthetic without benefit of sterile technique in that you prepared the medication, performed a minimal skin preparation and placed your fingers on the spinal needle, all without wearing sterile gloves. Additionally, you attempted the spinal puncture several times, all attempts being unsuccessful."

"11. On or about July 28, 1969, you had a meeting with the Chief of Staff, Doctor Thomas Hines, and Doctor William King, at approximately 7:30 a.m. in the morning, after which Doctor Hines, with the concurrence of Doctor King, cancelled certain surgery you had scheduled on the basis that you were in no condition physically or mentally to perform surgery."

2. The Carson-Tahoe Hospital is a public hospital and is governed by the provisions of NRS 450.010 through 450.700. NRS 450.160 provides as follows:

"The Board of hospital trustees shall make and adopt such bylaws, rules and regulations for its own guidance and for the government of the hospital, and such rules and regulations governing the admission of physicians to the staff, as may be deemed expedient for the economic and

equitable conduct thereof, not inconsistent with NRS 450.010 to 450.510, inclusive, or the ordinances of the city or town wherein such hospital is located."

NRS 450.180, subsection 4, further provides:

"The Board of hospital trustees shall have the power:

". . .

"4. To control the admission of physicians, surgeons and internes to the staff by promulgating appropriate rules, regulations and standards governing such appointments."

The Hospital Board of Trustees as the governing body of the institution, promulgated bylaws, rules, and regulations designed to govern the medical staff of the Hospital.

NRS 450.440, subsection 1, provides:

"1. The board of hospital trustees shall organize a staff of physicians composed of every regular practicing physician in the county in which the hospital is located who meets the standards fixed by the rules and regulations laid down by the board of hospital trustees."

The delegated power to establish admission standards for medical staff members impliedly includes the power to continue to regulate membership after admission. It is axiomatic under the rule of statutory construction that a power conferred by statute necessarily carries with it the power to make it effective and complete. See Checker, Inc. v. Public Serv. Comm'n, 84 Nev. 623, 629-630, 446 P.2d 981, 985 (1968), citing Koelling v. Board of Trustees, 146 N.W.2d 284 (Iowa 1966).

Article 4, Section 5, of the Hospital's "By-Laws, Rules & Regulations Governing the Medical Staff" provides in part that any Medical Staff member "who is guilty of unprofessional conduct, may have his privileges reviewed (,) altered or rescinded by the Board of Trustees on recommendation of the Medical Staff." Doctor Moore was formally charged by a complaint that set forth with specificity in 12 counts the acts with which he was charged. He was present with counsel at all stages of the proceedings and was afforded the right of cross-examination of witnesses and the right to call witnesses in his own behalf. There is no procedural due process challenge presented in this case. Rather, Doctor Moore complains that he was denied substantive due process because the acts of which he was found guilty (numbered paragraphs 7 and 11 of the complaint) were not specifically proscribed in the Hospital's "By-Laws, Rules and Regulations

Governing the Medical Staff", and therefore they cannot constitute a predicate for the Board's conclusion that he was guilty of unprofessional conduct. We do not agree.

In North Broward Hosp. Dist. v. Mizell, 148 So. 2d 1 (Fla. 1962), the court held that the governing body of the hospital should be permitted certain discretion under the broad standard "(for) the good of the hospital or the patients therein," and that such words were essentially the same in meaning, when used in such context, as those used in other instances to authorize suspension for "unprofessional conduct." The court ruled that the particular bylaw provision set an objective standard upon which a board could act and by which a physician would have sufficient notice to guide him in his conduct. The court said, 148 So. 2d at 5:

"There is at least equal difficulty in precise definition of professional fitness for staff membership in any given institution . . . Detailed description of prohibited conduct is concededly impossible, perhaps even undesirable in view of rapidly shifting standards of medical excellence and the fact that a human life may be and quite often is involved in the ultimate decision of the board."

The Oregon Supreme Court, in a case involving a revocation of a

physician's license to practice medicine, said in In re Mintz, 378 P.2d 945, 948 (Oregon 1963):

". . .(T)he variety of forms which unprofessional conduct may take makes it infeasible to attempt to specify in a statute or regulation all of the acts which come within the meaning of the term. The fact that it is impossible to catalogue all of the types of professional misconduct is the very reason for setting up the statutory standard in broad terms and delegating to the board the function of evaluating the conduct in each case . . ."

If the standard "unprofessional conduct" is sufficiently objective in the case of a revocation of a physician's license to practice, it should be a sufficiently objective standard to guide a hospital board in acting upon the revocation of a physician's medical staff privileges in a community hospital.

Today, in response to demands of the public, the hospital is becoming a community health center. The purpose of the community hospital is to provide patient care of the highest possible quality. To implement this duty of providing competent medical care to the patients, it is the responsibility of the institution to create a workable system whereby the medical staff of the hospital continually reviews and evaluates the quality of care being rendered

within the institution. The staff must be organized with a proper structure to carry out the role delegated to it by the governing body. All powers of the medical staff flow from the board of trustees, and the staff must be held accountable for its control of quality. The concept of corporate responsibility for the quality of medical care was forcibly advanced in Darling v. Charleston Community Memorial Hosp., 211 N.E.2d 253 (Ill. 1965), wherein the Illinois Supreme Court held that hospitals and their governing bodies may be held liable for injuries resulting from imprudent or careless supervision of members of their medical staffs. The role of the hospital vis-a-vis the community is changing rapidly. The hospital's role is no longer limited to the furnishing of physical facilities and equipment where a physician treats his private patients and practices his profession in his own individualized manner.

The right to enjoy medical staff privileges in a community hospital is not an absolute right, but rather is subject to the reasonable rules and regulations of the hospital. Licensing, per se, furnishes no continuing control with respect to a physician's professional competence and therefore does not assure the public of quality patient care. The protection of the public must come from some other authority, and that in this case is the Hospital Board of Trustees. The Board,

of course, may not act arbitrarily or unreasonably in such cases. The Board's actions must also be predicated upon a reasonable standard.

In Selden v. City of Sterling, 45 N.E.2d 329 (Ill. App. 1942), the court ruled that the recommendation of the medical staff executive committee, based on the observations of its members of another physician's work, established a sufficient standard upon which to act in the granting of medical staff privileges. In the present case, Dorothy Haman, a nurse anesthetist, testified regarding Doctor Moore's unsuccessful attempts to administer the spinal anesthetic. She also testified regarding the procedure normally utilized. Dr. Thomas Hines testified that the procedure used by Doctor Moore substantially deviated from the accepted practice. Doctor King likewise testified. These three witnesses established the objective standard for administering spinal anesthetics. Doctor Moore failed to establish any other standard. Rather, he admitted deviating from the standard procedure but felt that he was justified in doing so. Doctors Hines and King testified that Doctor Moore was in no physical or mental condition to perform surgery that he had scheduled on the morning of July 28, 1969. Doctor Hines, in conference with Doctor Moore, so advised him, and it was agreed that the scheduled surgery be cancelled. No physician should perform surgery when he is not physically or

mentally fit to do so.

After reviewing the record, it is clear that the Board did not act arbitrarily in this case, or without a standard to guide it, and that the record does contain sufficient evidence to support the charge of violation of the standard of professional care required in such cases. Therefore, the judgment of the district court is affirmed.[1]

/s/ Mowbray, J.

We concur:

/s/ Zenoff, C.J.

/s/ Batjer, J.

[1] Of course, this ruling is not be be interpreted as barring forever Doctor Moore from seeking staff privileges at the Hospital. He may, if he wishes, at a later date submit his application for readmission to the Board for its consideration.

THOMPSON, J., with whom GUNDERSON, J., agrees, dissenting:

Dr. Moore, a Board certified physician and surgeon who specializes in obstetrics and gynecology, and is licensed to practice in Nevada, appeals from a judgment denying his petition for a writ of mandate to compel his admission to membership on the medical staff of Carson-Tahoe Hospital, a public hospital.[1] He was excluded from staff privileges for "unprofessional conduct" in that on one occasion he administered a spinal anesthetic without wearing sterile gloves, and on another occasion he had appeared at the hospital to perform surgery when in no condition physically or mentally to do so. The

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1 A doctor has a right to treat his patients in a public hospital so long as he conforms to the reasonable rules and regulations of the hospital. Findlay v. Board of Sup'rs of County of Mohave, 230 P.2d 526 (Ariz. 1951); Ware v. Benedikt, 280 S.W.2d 234 (Ark. 1955); Hamilton County Hospital v. Andrews, 84 N.E.2d 469 (Ind. 1949). And, of course, a writ of mandate may issue "to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded. . . ." NRS 34.160; State v. City of Parkersburg, 136 S.E.2d 783 (W. Va. 1964).

spinal anesthetic was administered without damage to the patient. Dr. Moore acquiesced in the postponement of the scheduled surgery and successfully performed the operation at a later time.

1. It is apparent that important rights and policies are involved. The effect of expulsion from a medical staff can be disastrous for it may follow the doctor to other areas and have the result of denying to a licensed physician qualified to practice in Nevada the right to fully exercise his profession. Conditions of modern medicine almost make it imperative that a doctor have a hospital in which he can practice. On the other hand, a hospital cannot function without its medical staff whose most important responsibility is to see that the staff members conform to certain standards which the community has the right to expect.

The Board of Hospital Trustees enjoys the power to control the admission of physicians to the staff by promulgating appropriate rules, regulations and standards (NRS 450.180(4); 450.440(1)) and concomitantly, possesses the power to exclude physicians who do not comply with appropriate rules thus promulgated. The "By-Laws, Rules and Regulations Governing the Medical Staff" promulgated by the Carson-Tahoe Board of Trustees, in relevant part, provide only that any Medical Staff member "who is guilty of

unprofessional conduct may have his privileges reviewed, altered or rescinded by the Board of Trustees on recommendation of the Medical Staff." One searches in vain for a description of "unprofessional conduct" even in general terms. Herein lies the difficulty with the instant matter. A hospital should not be permitted to adopt standards for the exclusion of doctors which are so vague and ambiguous as to provide a substantial danger of arbitrary discrimination in their application. Rosner v. Eden Township Hospital District, 375 P.2d 431 (Cal. 1962); Jacobs v. Martin, 90 A.2d 151 (N.J. Sup. 1952).

Our legislature has defined "unprofessional conduct" for the guidance of the Board of Medical Examiners in exercising its disciplinary powers. NRS 630.030; 630.300. A definition was deemed essential in order to guard against discriminatory action by the Board of Medical Examiners. A suitable definition is equally essential to protect a hospital staff member from arbitrary conduct by a Board of Hospital Trustees of a public hospital. Absent that definition, the Board is clothed with almost unlimited power, susceptible of abuse.

2. The acts for which Dr. Moore was expelled from the staff point to the need for a definition of "unprofessional conduct." His acquiescence in the request not to perform scheduled surgery was an act of

compliance rather than an act of disobedience. And, the administration of an anesthetic without sterile gloves can be no more than an isolated instance of negligence which did not result in injury or damage. Such an isolated act without injury can not be a reasonable basis for revocation of staff privileges, for if it is, and if enforced equally and without discrimination, medical staffs will disappear entirely. Every professional man errs from time to time.

3. The Board is concerned with its liability to third persons for the misconduct of its staff members. Darling v. Charleston Community Memorial Hospital, 211 N.E.2d 253 (Ill. 1965). This is a legitimate concern, but it possesses no relevance to the case at hand. Neither of the instances relied upon by the Board to justify the expulsion of Dr. Moore could possibly result in Board liability to others. Consequently, this concern of the Board points to the arbitrariness of its action rather than to a reason for sustaining it. Cf. Boswell v. Bd.Med.Ex. 72 Nev. 20, 293 P.2d 424 (1956).

The judgment should be reversed with directions to issue a writ of mandate compelling the Board to admit Dr. Moore to membership on the medical staff.

/s/ Thompson, J.

/s/ Gunderson, J.

APPENDIX B

IN THE FIRST JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

GEORGE L. MOORE, Petitioner, vs. THE BOARD OF TRUSTEES OF CARSON-TAHOE HOSPITAL, a Public Hospital, and WILLIAM SCHULTZ, WILLIAM YOUNG, GENE GOLD, JOSEPH LITTLEFIELD, and LOTTIE SCOTT, constituting the Members of said Board, Respondents.	No. 29957

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-entitled cause having come on for hearing on February 17, 1970, before the Court without a jury, upon the application of the above-named petitioner, CARL MARTILLARO, ESQ., appearing for petitioner, and GEORGE ALLISON, ESQ., of LAXALT, BERRY

& ALLISON, appearing for respondents; and oral argument having been waived and the cause having thereupon been submitted to the Court for decision upon the record and written briefs submitted by both parties, the Court being fully advised now finds the following facts:

FINDINGS OF FACT

1. That petitioner, DR. GEORGE MOORE, is a duly licensed physician authorized to practice medicine under the laws of the State of Nevada and is a board certified obstetrician and gynecologist specialist.

2. That during the period of February 1, 1965 to March 12, 1970, Dr. Moore was actually engaged in the practice of medicine in Carson City, Nevada, and was at all times during said period an active member of the medical staff of Carson-Tahoe Hospital, Carson City, Nevada, which entitled him to full staff privileges in the use of said hospital.

3. That for all purposes herein, respondent, CARSON-TAHOE HOSPITAL, is a public hospital operated and governed by a duly elected Board of Trustees composed of five (5) members.

4. That at all times herein mentioned there existed medical staff by-laws adopted by the Board of Trustees of said Carson-Tahoe Hospital on October 22, 1964, which set forth the

procedure for any action involving termination of medical staff privileges.

5. That on July 30, 1969, following a meeting of the medical staff of Carson-Tahoe Hospital said medical staff submitted a written recommendation to the Board of Trustees recommending that the staff privileges of George L. Moore, be immediately terminated, due to unprofessional conduct.

6. That on August 20, 1969, Dr. Moore was informed in writing of the charges of unprofessional conduct made against him and that an administrative hearing as to the extent and basis of the allegations would be held.

7. That a hearing before the Board of Trustees on the charge of unprofessional conduct was conducted on November 25, 1969, December 3, 4 and 6, 1969.

8. That on February 20, 1970, petitioner's medical staff privileges were terminated by a majority vote of the Board of Trustees.

CONCLUSIONS OF LAW

1. That the Board of Trustees of a public hospital is legally vested with discretionary power to terminate the medical staff privileges of a member of the medical staff upon sufficient evidence and a fair hearing process.

2. That the Board of Trustees in exercising its termination discretion is not limited solely to consideration of violations of specific written hospital regulations or by-laws, or state laws, and that the Board of Trustees is in addition necessarily vested with the authority to make a determination as to whether alleged specific instances of misconduct of a physician on the hospital medical staff constitutes "unprofessional conduct."

3. That there is sufficient evidence to support the decision of the Board of Trustees of Carson-Tahoe Hospital that the petitioner was guilty of unprofessional conduct and that petitioner was accorded a fair hearing in accordance with accepted standards of procedural due process.

4. That the Board of Trustees did not act arbitrarily or in abuse of its discretion or in excess of its jurisdiction.

IT IS THEREFORE HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the application for an alternate writ of mandate and temporary restraining order restraining respondents from preventing petitioner from exercising his medical staff privileges at Carson-Tahoe Hospital be, and hereby are, dismissed and the said alternate writ and temporary restraining order previously issued are hereby

dissolved.

2. That the Board of Trustees' decision terminating petitioner's medical staff privileges be given immediate effect as adopted and promulgated heretofore.

DATED this 30th day of June, 1971.

/s/ Richard L. Waters, Jr.
DISTRICT JUDGE

APPENDIX C

CARSON-TAHOE HOSPITAL
Carson City

January 10, 1970

IN THE MATTER OF DR. GEORGE MOORE, M.D.

Statement of the Case

No. 1:

At a special board meeting on July 31, 1969, the Medical Staff made a recommendation to the Board of Trustees that staff privileges of Dr. Goerge Moore be terminated due to unprofessional conduct. The board accepted this recommendation at that time on the basis that the recommendation was the result of five years' evaluation of Dr. Moore and repeated complaints to the Executive Committee and Medical Staff about the conduct of Dr. Moore. Dr. Moore was notified at 5:30 p.m., July 31, 1969, of the Board's decision. Attorney George Allison mailed to Dr. Moore written legal notice on August 1, 1969.

No. 2:

Discussion between Mr. Allison, Hospital Attorney, Mr. Martillaro, Dr. Moore's attorney, and the District Judge ended with the Judge granting

hospital privileges to Dr. Moore pending a formal hearing.

No. 3:

On August 20, 1969, a formal letter listing specific charges was sent by certified mail to Dr. Moore. The letter indicated that an administrative hearing would be held on September 11, 1969, prior to making a final decision on the continuance of hospital privileges. At that time the allegations indicated in the letter would be heard and evidence could be presented by both sides.

No. 4:

On August 25, 1969, the board agreed that the administrative hearing be a closed one. On this same date William E. Schultz, Board Chairman, was elected Hearing Officer. Dr. W. R. King, board member, asked to be excused from the hearing, and his request was granted.

No. 5:

At 7:00 p.m. on September 11, 1969, the Board of Trustees met to hold the properly scheduled administrative hearing to consider Dr. George Moore's privileges at the hospital. Mr. Allison asked that the hearing be delayed for a short time in that Dr. Moore and his attorney, Mr. Martillaro, were meeting with the Medical Staff.

Approximately 10:00 p.m., same date, the Medical Staff advised the Board that Dr. Moore had decided to resign, under certain conditions, rather than face an administrative hearing. This recommendation was accepted after discussing the terms of the agreement with both Dr. Moore and his attorney, Mr. Martillaro. Transcript of this meeting is on file.

No. 6:

On September 22, 1969, the Board reviewed the agreement that Mr. Allison had prepared concerning Dr. Moore's probable resignation.

No. 7:

At a special meeting on October 12, 1969, the Board was notified that Dr. Moore refused to sign the agreement originally agreed to by both Dr. Moore and his attorney. The reason given was that some Doctor had prevented Dr. Moore from getting on the staff at a Las Vegas hospital. A new hearing date was tentatively set for November 25, 1969, at this time.

No. 8:

On October 27, 1969, Mr. Allison reported that Dr. Moore again refused to sign the agreement because of the "voluntary resignation, release clause". The Board agreed to dispense with the news release. If Dr. Moore

again refused, the hearing on November 25 would proceed after proper notification by hospital attorney Mr. Allison. Dr. Moore again refused to sign the agreement.

No. 9:

The Administrative hearing concerning the hospital privileges of Dr. Moore began at 7:00 p.m. on November 25, 1969. The hearing continued on December 3, 1969, December 4, 1969, and was concluded on December 6, 1969. Transcripts of the hearing were received by the Hearing Officer on December 27, 1969.

Findings of Fact

No. 1:

Dr. George Moore is a licensed M.D. in Nevada and is a Board certified Ob. Gyn. specialist.

No. 2:

Dr. Moore had been a full-fledged member of the Carson-Tahoe Medical Staff until recently. After the charges were filed against him, he agreed to accept the status of a probationary Doctor until the outcome of the hearing was determined.

No. 3:

The Medical Staff By-Laws outline the procedure for an administrative

hearing and all aspects of the by-laws were adhered to in the development of the hearing and in the hearing itself.

No. 4:

Both the Hospital and Dr. George Moore were represented by legal counsel prior to and during the hearing.

No. 5:

The Medical Staff By-Laws point out that after the report of the Hearing Officer is submitted and subsequent proper discussions have been held that the decision made or adopted by the Board of Trustees shall be final, subject only to court review on the part of either party.

Proposed Decision and Recommendation

On the basis of the hearing each allegation concerning Dr. George Moore's professional conduct is hereby analyzed and comments made accordingly:

No. 1:

Concerning allegations 1 and 2, there was no evidence adduced, and the charge is not sustained.

No. 2:

Concerning allegation number 3 dealing with the patient who was admitted in a state of incomplete

abortion: Evidence presented appeared to be in conflict as to the severity of the patient's hemorrhaging. Although there is general agreement among Doctors to inform each other in advance to cover for one another, this may not always be the case in an emergency. Dr. Moore evidently felt that he was not up to seeing his patient and that is why he had the nurse contact Dr. Stewart. Evidence did not allude to anything reverse enough to warrant positive action on the part of the Board.

No. 3:

Concerning allegation number 4, no evidence was adduced, and the charge is not sustained.

No. 4:

Concerning allegation number 5, with reference to profane and abusive language: Evidence indicated that this is not necessarily rare around a hospital. Witnesses testified that they had heard language of this type but that they didn't expect Dr. Moore with his professional standing to use it. It appeared more shocking than offensive. Evidence appears in such conflict that it is not of the clear and convincing quality necessary to sustain the charge.

No. 5:

Concerning allegation number 6

relating to the inducement of a premature baby: Testimony was given both to indicate that the baby was premature and that it was of full term or so close that it was a matter of medical judgment as to whether or not delivery was in order. At the time of this incident Dr. George Moore was called before the Medical Staff to explain his actions. Evidence was presented to the effect that the Medical Staff agreed that probably an error in medical judgment occurred, and so the Medical Staff decided to take no further action at that time. On the basis of the action taken at that time it appears that if we were to react now to something that has been settled previously that we would be out of order.

No. 6:

Concerning allegation number 7 dealing with the administering of a spinal anesthetic: Reliable evidence of great quantity was presented to show that the action taken by Dr. Moore did not adhere to the practices of this hospital. Standards need not be in writing in all situations, the very fact that the procedure used by Dr. Moore in this situation was different than he or any other Doctor on this staff has ever used is evidence enough that Dr. Moore was in error. The evidence presented here does support and sustain the charge.

No. 7:

Concerning allegations number 8 and 12 relating to the performing of a circumcision on an infant. Evidence clearly indicates that Dr. Moore did things differently at this time than he had ever done before. The evidence did not clearly indicate why Dr. Moore had difficulty other than to state that his eyes were blurred and that his hands were sluggish. Evidence indicated that even though things were done differently the nurses readily assisted, and the patient was not duly harmed. Although things were done differently, no real evidence was adduced, and the charge is not sustained.

No. 8:

Concerning allegation number 9 relating to the removal of sutures from a patient. Evidence indicated that here again Dr. Moore had difficulty in doing a procedure that had not caused him trouble in previous similar situations. Evidence in this situation alone is not sufficient to sustain the charge.

No. 9:

Concerning allegation number 10, no evidence was adduced, and the charge is not sustained.

No. 10:

Concerning allegation number 11

relating to the cancelling of surgery. Evidence clearly indicated that Dr. George Moore appeared at the hospital to perform surgery when he was in no condition to do it. This Dr. Moore admitted to himself when he abided by the decision of his fellow doctors without comment. Had not Dr. Moore been refrained from doing surgery, he probably would have gone ahead. There naturally can be no evidence to indicate what might have happened. Evidence is ample in this situation to support and sustain the charge.

Evidence clearly indicates that the allegations against Dr. Moore of the most serious nature seemed to occur within a short span of time, namely, three days. Two of the charges that are supported by evidence occurred during this time as well as others that did not appear to follow normal procedure but were not severe enough to sustain the charge. The Board of Trustees have the responsibility for providing the highest type of medical service to this community through its medical staff. If the Board did anything less, it would be derelict in its duties and responsibilities. Whenever evidence is properly and legally presented to show that any member of the Medical Staff jeopardizes this type of service it is the responsibility of the Board to act accordingly.

Therefore, it is the recommendation of the Hearing Officer, that since

evidence does support and sustain two of the charges, that the privilege to practice medicine in the Carson-Tahoe Hospital by Dr. George Moore be denied. To do anything less would be dereliction of duty on the part of those elected by the public to serve its best interests.

Respectfully submitted

/s/ William E. Schultz

William E. Schultz
Hearing Officer

February 20, 1970

Dr. George L. Moore
1501 No. Carson Street
Suite 210
Carson City, Nevada 89701

Dear Dr. Moore:

This is to inform you that the Board of Trustees, Carson-Tahoe Hospital, has received and duly considered the findings of fact and proposed decision and recommendations of William E. Schultz, the duly appointed Hearing Officer, in the matter of the termination of your Medical Staff privileges.

The Board of Trustees on February 19, 1970, based upon the record including the transcript of the hearing and all evidence submitted therein, voted to adopt without change the findings of fact and proposed decision and recommendation of the Hearing Officer; attached hereto as Exhibit "A" is the findings of fact and proposed decision and recommendations of the Hearing Officer.

Therefore, it is the final decision of the Board of Trustees of Carson-Tahoe Hospital that your Medical Staff privileges be and hereby are terminated, effective immediately.

Sincerely,

/s/ William E. Schultz
William E. Schultz
Chairman, Board Trustees

xxx

29 Ruby Lane
Carson City, Nevada
February 22, 1970

William E. Schultz
Hearing Officer
In the Case of George Moore, M.D.
Carson-Tahoe Hospital
Carson City, Nevada

Dear Bill:

This is to record my dissent from the decision made February 19, 1970 by the majority of the members of the Board hearing the case of George Moore, M.D. I expressed my dissent from the proposed decision and my objection to the terminology of the report at the regular meeting of the Board of Trustees on January 26, 1970.

In my opinion a much more serious allegation than those brought against Dr. Moore in this hearing had previously been brought against him, at the time the Board initially acted to terminate his hospital privileges. At that time it was indicated that there was something wrong with Dr. Moore which might prevent him from performing competently. Had this charge been made and proved in the hearing, I would have considered it adequate to sustain the action finally taken by the Board. This charge and others previously made were, however, not included amongst those brought against Dr. Moore in this

hearing. I can only assume that they were adjudged either untrue or not provable by the hospital's attorney and that they should therefore be totally disregarded in the judgment of this hearing.

I agree with the recommendations of the Hearing Officer regarding allegations 1, 2, 3, 4, 5, 6, 8, 9, 10 and 12 that they be disregarded.

I disagree with the conclusions of the Hearing Officer regarding allegations 7 and 11, in which he found evidence maintaining the charges and justifying the action which was later taken. My conclusions were as follows:

Allegation 7, procedure in giving a spinal anesthetic:

Evidence and testimony were presented which were sufficient to convince me that the wearing of gloves is not essential to the maintenance of sterility in administering a spinal anesthetic and that the wearing of gloves does not insure the sterility of the procedure. Testimony regarding other shortcomings of the procedure used was conflicting and inconclusive. The statement by the Hearing Officer that Dr. Moore's procedure in this instance was "different than he or any other doctor on this staff has ever used" is incorrect since Dr. Moore himself stated that he had on previous occasions not used gloves. Other

elements brought out in testimony which seem of significance to me are: (1) Dr. Moore is notably more experienced in the particular mechanics involved than any of the others who testified, and (2) no damage to the patient resulted.

My conclusion, after listening to the testimony, is that as a general rule gloves should be worn in administering spinal anesthetics, primarily as an additional safety factor which can be simply applied. I would not, however, wish to be party to establishment of an arbitrary rule which meant automatic dismissal of one who did not wear them. It seems to me that our doctors should be guided in such matters by their own best medical judgment in the light of particular circumstances rather than by arbitrary rules imposed by the Board of Trustees. The fact that such rules, as in this case, need not be clearly stated and in writing prior to their application seems to me to make them doubly dangerous in inhibiting doctors from the use of their best professional judgment.

Allegation 11, regarding cancellation of surgery.

The only clear conclusion that I was able to reach in this connection was that Dr. Moore was willing to abide by the judgment of two of his peers that he should not perform surgery at a particular time. I do not believe that

this is derogatory to Dr. Moore. I accept the doctor's explanation of the reason for his bloated appearance, which was in no way impeached, as probably resulting from too much sleep. The remainder of the Hearing Officers conclusions appear to be entirely conjectural and insufficient to justify the action recommended and taken.

Respectfully submitted,

/s/ J. W. Littlefield

J. W. Littlefield, Trustee

APPENDIX D

Nevada Revised Statutes 630.030 "Unprofessional conduct" defined. As used in this chapter, "unprofessional conduct" means:

1. Obtaining a certificate upon fraudulent credentials, or gross misrepresentation.

2. Procuring, or aiding or abetting in procuring, criminal abortion.

3. Obtaining a fee on assurance that a manifestly incurable disease can be permanently cured.

4. Advertising medical business in which grossly improbable statements are made.

5. Any advertising of any medicine or any means whereby the monthly periods of women can be regulated, or menses reestablished if suppressed.

6. Willful disobedience of the law, or of the rules and regulations of the state board of health.

7. Conviction of any offense involving moral turpitude, or the conviction of a felony. The record of the conviction shall be conclusive evidence of unprofessional conduct.

8. Administering, dispensing or prescribing any narcotic drug (opium, coca leaves, cannabis or any preparation or derivative of any of them or any other habit-forming drug) otherwise than in the course of legitimate professional practice and for the prevention, alleviation or cure of disease or for the relief of suffering, and not primarily for the purpose of catering to the cravings of an addict.

9. Conviction or violation of any federal or state law regulating the possession, distribution or use of any narcotic drug aforesaid. The record of conviction shall be conclusive evidence of such unprofessional conduct.

10. Habitual intemperance or excessive use of cocaine, morphine, codeine, opium, heroin, alpha eucaine, beta eucaine, novocaine or chloral hydrate, or any of the salts, derivatives or compounds of the foregoing substances, or of alcohol or alcoholic beverages, or of any other habit-forming drug or substance.

11. Conduct unbecoming a person licensed to practice medicine or detrimental to the best interests of the public.

12. Violating, or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any

provision or term of this chapter.

13. Employing, directly or indirectly, any suspended or unlicensed practitioner in the practice of any system or mode of treating the sick or afflicted, or the aiding or abetting of any unlicensed person to practice medicine as defined in this chapter.

14. Gross negligence in the practice of any phase of the profession.

15. The adjudication of insanity by a court of competent jurisdiction. The record of the adjudication, judgment or order of commitment is conclusive evidence of such unprofessional conduct.

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF NEVADA

GEORGE L. MOORE, Appellant, vs. THE BOARD OF TRUSTEES OF CARSON-TAHOE HOSPITAL, a Public Hospital, and WILLIAM SCHULTZ, WILLIAM YOUNG, GENE GOLD, JOSEPH LITTLEFIELD and LOTTIE SCOTT, constituting the members of said Board, Respondents.	)	No. 6684

APPELLANT'S OPENING BRIEF

* * * * * *

LEGAL ISSUES PRESENTED

1. MAY A PUBLIC HOSPITAL TERMINATE MEDICAL STAFF PRIVILEGES OF A PHYSICIAN WHO MEETS ALL ELIGIBILITY REQUIREMENTS FOR SUCH STAFF PRIVILEGES ANL WHO HAS NOT VIOLATED ANY BY-LAW PROVISION OR REGULATION OF THAT PUBLIC

HOSPITAL?

2. IS A TERMINATION OF MEDICAL STAFF PRIVILEGES ARBITRARY, CAPRICIOUS AND DISCRIMINATORY ON THE GROUNDS OF "UNPROFESSIONAL CONDUCT" WHEN "UNPROFESSIONAL CONDUCT" IS NOT DEFINED IN THE HOSPITAL BY-LAWS OR RULES AND REGULATIONS?

A. IS SUCH AN UNDEFINED STANDARD SO VAGUE AND AMBIGUOUS AS TO CONSITUTE AN UNCONSTITUTIONAL BASIS TO DEPRIVE A PHYSICIAN OF A NECESSARY PRIVILEGE OF PRACTICING HIS PROFESSION?

B. IN THE ABSENCE OF ANY DEFINITION OF "UNPROFESSIONAL CONDUCT" IN THE HOSPITAL BY-LAWS OR REGULATIONS, MUST THE COURT LOOK TO THE DEFINITION OF SUCH TERMINOLOGY IN THE MEDICAL PRACTICES ACT OF THE NEVADA REVISED STATUTES?

3. EVEN ASSUMING THAT "UNPROFESSIONAL CONDUCT" CAN BE DETERMINED ABSENT ANY STANDARD, DOES THE UTILIZATION OF A CLINICAL TECHNIQUE WHICH DIFFERS FROM THAT TECHNIQUE USED BY OTHER PHYSICIANS IN THE SAME HOSPITAL CONSTITUTE SUFFICIENT GROUNDS FOR REVOCATION OF ALL STAFF PRIVILEGES?

4. AGAIN ASSUMING THAT "UNPROFESSIONAL CONDUCT" CAN BE DETERMINED ABSENT ANY STANDARD, DOES THE JUDGMENT OF TWO STAFF PHYSICIANS THAT APPELLANT

WAS NOT PHYSICALLY AND MENTALLY PREPARED TO CONDUCT A SCHEDULED SURGERY, SUCH JUDGMENT BEING ACQUIESED IN BY APPELLANT, CONSTITUTE CAUSE FOR REVOCATION OF ALL STAFF PRIVILEGES?

* * * * * *

IN THE FIRST JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

GEORGE L. MOORE, M.D.,	No. 29946
Plaintiff,	
vs.	
BOARD OF TRUSTEES, CARSON-TAHOE HOSPITAL,	
Defendant.	

COMPLAINT

COMES NOW the plaintiff and alleges as follows:

* * * * * *

5. That the charges pending against

him are cumulative and vague, and to have a hearing on them as charges would result in an impossible burden on plaintiff, resulting in a violation of due process of law, equal protection, and a violation of his civil rights, and furthermore, that three of the said charges are within the restrictions set forth in NRS 11.190, being the Statute of Limitations.

* * * * * *

IN THE FIRST JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

GEORGE L. MOORE, Petitioner, vs. THE BOARD OF TRUSTEES OF CARSON-TAHOE HOSPITAL, A PUBLIC HOSPITAL, AND WILLIAM SCHULTZ, WILLIAM YOUNG, GENE GOLD, JOSEPH LITTLEFIELD, and LOTTIE SCOTT, constituting the Members of said Board, Respondents.	No. 29957

PETITION FOR WRIT OF MANDAMUS

COMES NOW the Petitioner above named and respectfully shows this Court as follows:

* * * * * *

5. That the Respondents have no just cause for the summary and arbitrary dismissal aforesaid, and to exclude Petitioner from the medical staff of said Hospital constitutes an abuse of discretion and an excess of jurisdiction on the part of Respondents.

6. That the Respondents have promulgated no standards of conduct for medical staff members and have passed no rules and regulations concerning the conduct of the members of the said Hospital staff, but rather have acted arbitrarily and capriciously and without just cause in the dismissal of Petitioner.

* * * * * *

8. That Petitioner has a right to function as a member of the medical staff of said public hospital.

* * * * * *

IN THE FIRST JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

GEORGE L. MOORE, M.D., Plaintiff, vs. BOARD OF TRUSTEES, CARSON-TAHOE HOSPITAL, Defendant,	No. 29476

* * * * * *

POINTS AND AUTHORITIES

1. The Board of Trustees must adopt proper standards governing the conduct of physicians and establishing what shall and shall not be grounds for dismissal, and not merely charge that any previously undefined conduct shall be "unprofessional conduct" and arbitrary grounds for dismissal.

APPENDIX F

IN THE SUPREME COURT
OF THE STATE OF NEVADA

GEORGE L. MOORE, Appellant, vs. THE BOARD OF TRUSTEES OF CARSON-TAHOE HOSPITAL, a public hospital, and WILLIAM SCHULTZ, WILLIAM YOUNG, GENE GOLD, JOSEPH LITTLEFIELD and MARY GIALY, constituting the members of said Board, Respondents.	No. 6684

ORDER

Good cause appearing,

IT IS ORDERED that:

(1) Rehearing be denied;

(2) The stay order of July 6, 1971 is hereby vacated; and

(3) The remittitur shall issue forthwith.

Dated: May 3, 1972.

/s/ Zenoff, C.J.

/s/ Batjer, J.

/s/ Mowbray, J.

CC: Counsel of record

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-170

GEORGE L. MOORE,
Petitioner,

vs.

THE BOARD OF TRUSTEES OF CARSON-TAHOE HOSPITAL, a Public Hospital, and WILLIAM E. SCHULTZ, WILLIAM A. YOUNG, L. GENE GOLD, JOSEPH N. LITTLEFIELD, MARY O. KNAPP, and WILLIAM R. KING, constituting the members of said Board,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada

---

BRIEF FOR RESPONDENTS IN OPPOSITION

The Respondents, William E. Schultz, William A. Young, L. Gene Gold, Joseph N. Littlefield, Mary O. Knapp, and William R. King, pray that the Petition

filed with this Court by George L. Moore for a Writ of Certiorari to review the opinion and judgment of the Supreme Court of the State of Nevada rendered in these proceedings on April 6, 1972, and made effective May 3, 1972, be denied.

OPINIONS BELOW

The opinion of the United States District Court, District of Nevada, is unreported, and appears at Appendix C, *infra,* pp. xii-xiv.

QUESTIONS PRESENTED

As stated in the Petition for Writ of Certiorari, the By-Law provision, "unprofessional conduct," was not defined in the By-Laws in terms of specific written rules of conduct. An existing and established objective standard of conduct in relation to each of the charges filed against Petitioner was defined for the hearing Board through expert testimony. Therefore, the Questions Presented would be more accurately stated as follows:

1. Is the Board of Trustees of a public hospital in exercising its admitted authority to terminate medical staff privileges of a physician limited solely to consideration of violations of specific written hospital rules and regulations?

2. Is there sufficient evidence in this case to support the findings of the Board?

STATEMENT OF FACTS

Respondents herein accept to the extent stated in the Petition for Writ of Certiorari the statement of facts of Petitioner as being substantially true and correct, but feel it is necessary to submit in addition to, and as an extension of facts cited in Petitioner's statement of facts, further facts which will serve to clarify certain and somewhat misleading statements in Petitioner's statement of facts.

On July 30, 1969, one day prior to the termination of Petitioner's staff privileges mentioned at page 6 of Petitioner's Petition, Petitioner, *with his counsel,* appeared before the Carson-Tahoe Hospital active medical staff to discuss the same allegations of "unprofessional conduct" that were ultimately to be the basis of the hearing before the Board of Trustees. A copy of the minutes of said meeting were part of the record on appeal to the Nevada Supreme Court. (Appendix A, *infra,* pp. i-x) Following said hearing, the active medical staff submitted a written recommendation to the Board of Trustees to the effect that "staff privileges of George L. Moore, M.D., be immediately terminated due to unprofessional conduct". (Appendix B, *infra,* p. xi) On July 31, 1969, the Board of Trustees, only after due consideration of the medical staff's recommendation and pursuant to Subsections A and H, Section 7, Article 4, of the By-Laws of the medical staff of Carson-Tahoe Hospital, terminated Petitioner's staff privileges. The First Judicial District Court of the State of Nevada, in and for Carson City, subse-

quently entered an Order allowing Dr. Moore to retain conditional staff privileges until a full administrative hearing by the Board of Trustees.

Petitioner was then again informed in writing of the specific allegations of "unprofessional conduct" made against him and of a date for a full hearing before the Board of Trustees on such charges.

In contrast to Petitioner's statement that 10 of the 12 charges were dropped due to "lack of proof," a close reading of the findings by the Board of Trustees will reveal that there was definitely evidence presented on most of the 10 charges, not just on two charges. (Petitioner's Appendix C, p. xx)

Petitioner's characterization of one of the charges as a "failure to use rubber gloves," is misleading. The charge was for failure to utilize any of the accepted and standard sterile techniques while administering spinal anesthetics, which included much more than the failure to use rubber gloves. (Petitioner's Appendix A, at p. iii) The Petitioner's characterization of charge 11 as abiding by the judgment of Dr. Hines and Dr. King is again misleading. The charge was that Petitioner intended to perform surgery despite his obviously impaired condition to do so and was prevented from proceeding only by action on the part of the Chief of Staff and another surgeon, not Petitioner's voluntary action. (Petitioner's Appendix A, at page iii)

Following the filing of the Nevada Supreme Court opinion and subsequent order denying rehearing, Peti-

tioner filed an action in the United States District Court, District of Nevada, under the provisions of the Civil Rights Act, 42 United States Code, §1983, alleging exactly the same issues considered by the Nevada Supreme Court and which are the basis of his application to this Court for a Writ of Certiorari. On June 20, 1972, an order dismissing the action was entered by the said United States District Court, District of Nevada, on the grounds of Res Judicata. (Appendix C, *infra,* pp. xii-xiv) Petitioner filed on July 11, 1972, an appeal with the Ninth Circuit Court on the decision of the United States District Court. (Appendix D, *infra,* p. xv) The record on appeal has been docketed (Appendix E, *infra,* p. xvi), and the appeal is now pending.

ARGUMENT

A. THERE IS NO FEDERAL QUESTION OF SUBSTANCE INVOLVED

1. In the instant case the medical staff By-Laws were followed in all stages of the proceedings, including a hearing before the full medical staff, and their subsequent recommendation to the Board of Trustees. The statutory powers of the Board of Trustees to act as they did is unchallenged by the Petitioner. Procedural due process was followed at all stages. (Petitioner's Appendix A, at page v) Evidence was presented on most of the charges and substantial evidence was presented on two charges which were the basis for the Board's action. (Petitioner's

Appendix A, at page ix and Appendix C, at page xxvi) Without question, the objective standard for administering a spinal anesthetic was established through the testimony of three experts—a nurse anesthetist and two physicians. (Petitioner's Appendix A, at p. ix) The same was true of the second charge. (Petitioner's Appendix A, at p. ix and Appendix C at p. xxviii)

Petitioner himself admits deviating from the accepted standard procedure. (Petitioner's Appendix A, at p. ix)

If the Board's action in terminating Petitioner's medical staff privileges was based upon proven and admitted deviations by Petitioner from a reasonably objective standard relating to medical competency and professional responsibility of which the Board was aware, the real issue is whether the Board's action is arbitrary and unreasonable. This is not a federal question of any substance. A reasonably objective standard was established and evidence of a deviation from that standard was presented. The only real question as it applies to Petitioner is essentially a review of the evidence which function was performed quite adequately by the state courts. (Petitioner's Appendices A and B)

Therefore, Petitioner's alleged federal question that the By-Law provisions providing for termination of staff privileges on the basis of "unprofessional conduct" *as it was applied to him* was a violation of due process is entirely without substantiation or merit.

2. Petitioner also contends that the standard of "unprofessional conduct" without further written amplification or definition in the By-Laws is too vague and indefinite and void per se. Prior United States Supreme Court opinions and lower court opinions have resolved this issue so it is no longer a substantial federal question. It was decided by this Court in the early case of *Selling v. Radford,* 243 U.S. 46, 37 S.Ct. 377, 61 L.Ed. 585 (1917) that the standard "unprofessional conduct" is a proper standard in determining fitness for practicing a profession. More recently in *Konigsberg v. State Bar,* 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed. 810 (1957) this Court made reference to the standard "good moral character" indicating it was difficult of definition and could be abused, but accepted it as a proper standard for a state to use in evaluating persons for admission to the State Bar.

In a second case involving Mr. Konigsberg, *Konigsberg v. State Bar,* 366 U.S. 36, 6 L.Ed.2d 105, 81 S.Ct. 997, at pages 40 and 41 (1961), this Court again reiterated its position that the standard "good moral character" is unquestionably acceptable in evaluating the fitness of a bar applicant.

In *Brinkley v. Hassig,* 130 Kan. 874, 289 P. 64 (1930), a case very similar to the instant case, the State Medical Board revoked the license of a physician to practice medicine following a hearing upon the filing of a complaint alleging eleven specific charges of fraud, immorality and unprofessional conduct. A Kansas statute allowed revocation for "un-

professional conduct". An appeal was taken to the United States Supreme Court and was dismissed because no substantial federal question was presented. *Brinkley v. Hassig,* 282 U.S. 800, 51 S.Ct. 39, 75 L.Ed. 720 (1930). Subsequently, in the same matter the Circuit Court of Appeals, Tenth Circuit, held that the statute providing for revocation of a license on grounds of "unprofessional conduct" was valid. *Brinkley v. Hassig,* 83 F.2d 351 (10th Cir. 1936).

In due process terms there is no logical distinction between disbarment and denial of admission. *In Re Ruffalo,* 390 U.S. 544 (1968).

Statutes or By-Laws which permit revocation of a medical license for "unprofessional conduct", "incompetency" or similar language have been held valid in the large majority of jurisdictions, both federal and state, notwithstanding their generality. *Sosa v. Bd. of Management of the Val Verde Memorial Hosp.,* 437 F.2d 173 (5th Cir. 1971); *Woodbury v. McKinnon,* 447 F.2d 839 (5th Cir. 1971); *North Broward Hospital Dist. v. Mizell,* 148 So.2d 1 (Fla. 1962); *Arizona State Bd. of Medical Examiners v. Clark,* 398 P.2d 908 (Ariz. 1965); *Darling v. Charleston Community Memorial Hospital,* 33 Ill.2d 326, 211 N.E.2d 253, 14 ALR3d 860 (1965); *Brinkley v. Hassig,* 83 F.2d 351 (10th Cir. 1936); *State Dental Examiners v. Savelle,* 90 Colo. 177, 8 P.2d 693 (1932). The Nevada Supreme Court decision *rejecting* Petitioner's argument that the standard of "unprofessional conduct" is too vague and indefinite and void on its face is in accord, not in conflict, with this

Court's decisions and the majority of lower court decisions.

B. THE DECISION OF THE NEVADA SUPREME COURT IS NOT IN CONFLICT WITH ANY DECISIONS OF THIS COURT.

1. Petitioner implies that the decision of the Supreme Court of the State of Nevada is in conflict with *Schware v. Bd. of Bar Examiners,* 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. 796 (1957) and *Konigsberg v. State Bar,* supra. It has been long established that the scope of review by the United States Supreme Court of a state administrative disbarment proceeding is narrowly restricted. *Selling v. Radford,* supra.

The long established principle of this Court that the scope of review in reviewing administrative hearings of this nature is quite narrow was reaffirmed in *Theard v. U.S.,* 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957), wherein it was stated:

> "It is not for this Court except within the narrow limits for review open to this Court, as recently canvassed in *Konigsberg v. State Bar,* 353 U.S. 252, and *Schware v. Bd. of Bar Examiners,* 353 U.S. 232, to sit in judgment on Louisiana disbarments . . ."

A review by this Court of the state disbarment proceedings in *Schware v. Bd. of Bar Examiners,* supra, and *Konigsberg v. State Bar,* supra, was granted only because of the existence of *special* and *exceptional* circumstances. In the *Schware* case the hearing board neither called any witnesses nor introduced any evidence of bad moral character against the applicant.

In both cases the reasons for disbarment were based upon guilt by association with the Communist party. There was no real evidence reasonably related to good moral character and even less evidence in any way related to the applicant's competence to practice law.

In the instant case all the charges relate either to Petitioner's general conduct while in the hospital or directly to his performance of a particular medical procedure. The evidence presented to sustain the charges was specifically related to his competency in medical techniques and procedures. The Board of Trustees did not have to assume any facts or accept any presumption of guilt through association such as the Board did in the *Schware* and *Konigsberg* cases. The Carson-Tahoe Hospital Board of Trustees did not have to make a decision as to whether the alleged conduct of Petitioner was related to medical competency as both the charges and evidence pertained specifically to medical competency. Their only question was one of the sufficiency of the evidence in a quantitative sense.

The facts of this case do not present any *special* or *exceptional* circumstances to bring it within the narrow limits of the scope of review of the United States Supreme Court. The reasons for termination of Petitioner's staff privileges have a completely rational connection with his fitness to practice medicine in conformance with the due process clause of the Fourteenth Amendment.

2. Petitioner also alleges a conflict of the Nevada Supreme Court decision with *Thompson v. Louisville,*

362 U.S. 199 (1960). The issue in that case was whether the record was totally devoid of evidence to support the charges. The decision of the Court turned not on the sufficiency of the evidence, but whether the conviction rested on any evidence at all. Both charges in the instant case which were ultimately used as the basis for the termination of Petitioner's staff privileges were supported by substantial and essentially unrebutted evidence of expert and eyewitnesses. If there is any issue on the evidence at all, it is a question of sufficiency only. As a result, the Nevada Supreme Court decision is not in conflict with *Thompson v. Louisville,* supra.

Petitioner, as well as the dissenting Judges in the Nevada Supreme Court decision, assume that the only method of proving medical incompetency is to have actual harm result to a patient from a doctor's conduct. The logical conclusion from this position being that only an injury is acceptable proof that a doctor's conduct is improper. Respondents submit that this reasoning is not the law nor the dictate of logic. All that is required is that there be produced relevant evidence of a substantial deviation from established and accepted practice.

Contrary to Petitioner's statement that a standard for revocation of medical staff privileges was established after the fact, the standard for administering spinal anesthetics and for physical and mental conditions for performing surgery had been in existence prior to Petitioner's actions. These standards were merely defined and presented to the Board of Trus-

tees at the time of the hearing as already established standards. These were not standards arbitrarily created at the time of the hearing. Although these procedures and conditions were not set forth in writing, they were obviously well recognized and long accepted within the medical profession.

C. THE ISSUES RAISED HERE HAVE BEEN PREVIOUSLY DECIDED OR INVOLVE A QUESTION OF REVIEWING EVIDENCE WHICH DOES NOT CONSTITUTE A SIGNIFICANT AND COMPELLING CONSTITUTIONAL QUESTION.

1. The validity of the standard of unprofessional conduct has been considered and accepted by this Court in prior decisions as a valid standard for assessing the conduct of a professional person. *Selling,* supra; *Schware,* supra; *Konigsberg,* supra.

The lower state and federal courts are virtually unanimous in accepting the proposition that all prohibited conduct that might be a basis for termination of medical staff privileges need not be in writing or specifically defined. *Selling v. Radford,* supra; *Konigsberg v. State Bar,* supra; *Sosa v. Bd. of Management of the Val Verde Memorial Hosp.,* supra; *Woodbury v. McKinnon,* supra; *North Broward Hospital Dist. v. Mizell,* supra; *Arizona State Bd. of Medical Examiners v. Clark,* supra; *Darling v. Charleston Community Memorial Hospital,* supra; *Schware v. Bd. of Bar Examiners,* supra; *Thompson v. Louisville,* supra, and Southwick, Hospital Medical Staff Privileges, 18 *DePaul Law Review,* 655 at page 663.

If any conflicts exist in the lower court decisions, it is only in the area of different facts in each case and not as to the applicability of the general principles. Petitioner is in essence requesting this Court to review the evidence and make a finding that even though there was some there was not enough evidence of "unprofessional conduct" to justify the severe action of termination of medical staff privileges. The hearing officer treated this question in his proposed decision and recommendation by stating that he felt that the evidence and the nature of two of the charges compelled and supported termination of Petitioner's staff privileges in order to insure the "highest type of medical service" to the community. (Petitioner's Appendix C, pp. xxvii and xxix) Subsequently, two appellate hearings on this issue were held, one in the First Judicial District Court and one in the Nevada Supreme Court, and both courts have held that there was sufficient evidence to justify the Board's action. Petitioner is now requesting this Court to review the judgment of the Board and two state courts.

D. NO QUESTION OF IMPERATIVE PUBLIC IMPORTANCE EXISTS WHICH WOULD JUSTIFY A WRIT OF CERTIORARI BEFORE JUDGMENT OF THE NINTH CIRCUIT COURT IN VIOLATION OF UNITED STATES SUPREME COURT RULE 20.

1. The exact issues presented to this Court in the Petition for Writ of Certiorari are presently pending in the Ninth Circuit Court of Appeals as a result of Petitioner's appeal from the United States District Court's order dismissing Petitioner's action. (Appendix D, p. xv)

The identical claim under the identical record that was presented to the Supreme Court of Nevada was presented to the United States District Court, for the District of Nevada. (Appendix C, *infra*, pp. xii-xiv) This case does not raise any questions of imperative public importance to justify the granting at this time of a Writ of Certiorari in violation of United States Supreme Court Rule 20, which states:

> "A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

CONCLUSION

The Writ of Certiorari requested by Petitioner should be denied for the reason that there is no substantial federal question involved; there exists no conflict between the Nevada Supreme Court decision

and prior United States Supreme Court decisions in this similar area; and there is no real conflict in the existence of the general principles involved in this type of case.

Dated, Carson City, Nevada,
August 23, 1972.

Respectfully submitted,
PAUL LAXALT,
Counsel for Respondents.

(Appendices Follow)

Appendix A

A special staff meeting was called by the Chief of Staff of the Carson Tahoe Hospital was brought to order at 7:38 P. M. July 30, 1969. The purpose was to consider the actions of the Executive Committee regarding Dr. Moore and his activities over the last week end. In attendance were Doctors Hines, Brown, King, Grundy, Stewart, Petty, Harper, Veverka, Ross, Baggett, Fulper, Moore, Collier, and Schieve. In addition there was also in attendance Mr. McGlade, George Allison, and Mr. Carl Martillaro. The meeting started with the issuance of copies of four letters that had been read at the Special Executive Committee meeting. The first letter was from Mrs. Blakely, and R. N. on duty at the hospital. The second letter was from Dot Hamen, anesthetist at the Carson Tahoe Hospital. The third letter was from Miss Indermuhl, R. N. chief nurse of obstetrics. The fourth letter was from Mrs. Bryant, R. N. of the Carson Tahoe Hospital. It was requested by Dr. Hines that all copies except for Mr. Allison and one for Mr. Martillaro be returned at the end of the meeting. Dr. Hines then proceeded to give further background on the events that had happened the following week end concerning Dr. Moore. First, Dr. Moore's behavior in his car downtown during the weekend. It was reported that Dr. Moore in attempting to pull into a parking lot in front of the post office backed on to the curb, striking a parking meter. He then backed rapidly away at about 10 miles an hour and striking a car that was parked behind. In this car were people

who know Dr. Moore and expected him to come out and make some statement to them. Dr. Moore then proceeded into the post office. On coming out of the post office he drove away in such a manner as to upset and concern both pedestrians on the street and observers on the sidewalk. This was at approximately 2:30 the afternoon of Sunday, July 27, 1969. Secondly, the following evening George Moore was called by the Chief of Staff at approximately 7:00 P. M. to request him to discuss with him the impending surgery scheduled for Monday July 28th. Dr. Moore was asked to come over, however, Dr. Moore was unable to attend this meeting due to a conflicting engagement. However, agreement was made to meet at the hospital at approximately 7:30 A. M. the morning of Monday July 28, 1969. The Chief of Staff stated that the prime reason for this desired meeting was the voice of concern that had been raised by nursing members of the hospital concerning Dr. Moore's ability at that time, and that the Chief of Staff wanted to get Dr. Moore's version of the events that had happened on the preceding day. The Chief of Staff then stated "The next morning I was in the medical library and saw Dr. Moore drive into the driveway of the Carson Tahoe Hospital. In so doing he drove two wheels over the curb and then had difficulty in parking his car. This led me to believe that he was not coordinating well at that time. Then Dr. King came into the library and at my request went down to help evaluate Dr. Moore's ability to do the surgery scheduled at 8:00. After talking with Dr. Moore I advised him that the proposed scheduled surgery was cancelled".

Following this a special Executive Committee meeting was called at noon of Monday, July 28th, to evaluate the actions of Dr. Moore.

The minutes of the Special Executive Committee meeting of July 28, 1969 were read. Comments were then invited from Dr. Hines. Dr. Moore then stated in rebuttal that they be examined with the first baby in the nursery. He also stated that the window mentioned in Miss Indermuhl's letter was defective and that a spring came out and required replacement before proper examination of the baby could be done. He also stated that he had difficulty in hearing the baby at that time and had difficulty in evaluating the descent of the testicle. Second: In regarding Mrs. Bryant's letter he stated that the laughing and kidding mentioned in her letter is a usual and customary thing with him with that particular nurse. Thirdly: In regarding the automobile accident, Dr. Moore stated that he is officially charged with reckless driving and that this citation is accepted by him. He pointed out the officer did follow him to the hospital and that there was no request by the officer for a blood alcohol or that there was any question of his sobriety.

Following this there was an open discussion. Dr. Petty asked Dr. Hines on what basis did Dr. Hines feel that Dr. Moore was not capable of performing the surgery. Dr. Hines in answer stated that I watched him drive in, and also on entering the emergency room he walked with a lack of coordination and he talked with difficulty. Dr. Petty then asked Dr.

King if he corroborated the above report and Dr. King answered yes. Next, Dr. Grundy stated that he wished to know a little bit more about the alleged spinal tap. Dr. Hines then stated that as Chief of Staff and with the permission of the patient, looked at the back of the patient. There appeared to Dr. Hines to be a number of skin puncture wounds that ranged from T11-T12 to L4-5. Dr. Grundy then asked how many, Dr. Hines stated approximately 8. Dr. Moore then spoke up and said I kept the needle point sterile at all times and there were more like three puncture sites. Dr. Petty then asked, George, can you explain the accusation that you have been atoxic and disoriented. Dr. Moore stated that this should be obvious that I have a right foot drop and that I have a partial paralysis in my right leg and at times I have fallen while attempting to walk. Dr. Grundy then asked Dr. Moore did you have any more difficulty walking Tuesday (sick) than you do now. Dr. Moore: No. Dr. Grundy: Did you have any more difficulty talking Tuesday (sick) than you do now. No. Dr. Grundy then directed the questioning to Dr. Hines and Dr. King: Do you agree? Dr. King responded, yes, he definitely had more difficulty in talking then and walking then than he does now. The discussion then evolved about the habitual use of gloves. Dr. Moore stated that he had been trained to do spinal punctures without the use of gloves and also that he did circumcision without the use of gloves. Dr. Grundy asked when he took his residency training. Dr. Moore responded 1949-1952. Dr. Hines then

asked: When did you first use gloves in the past? Dr. Moore responded that the first spinal tap given at this hospital was without gloves and for this he was criticized by the nursing staff. Dr. Brown then stated that during the time that he took training in Houston that at every hospital that he had been in required the use of sterile technique and the use of sterile gloves.

Dr. Grundy asked: When did you first start using gloves? Dr. Moore stated I first started using them here. Dr. Grundy asked: Have you always used them since? Dr. Moore responded some times yes and sometimes no. Dr. Grundy stated that I might say that at four major hospitals that I trained at in Houston gloves and sterile technique were enforced and have been done so since then because I called to a friend of mine who reported their use. Dr. Hines asked: Is there anyone here who has trained in spinal taps without the use of sterile gloves? There was no answer from the floor. Dr. Petty: During the last one and one-half years Dr. Grundy and I have been together at many social gatherings. During that time Dr. Moore has been noted to cut off his drinking at 3-4 drinks at a social gathering and has conducted himself in a gentlemanly manner. As far as a dilemma is concerned on the other side I have colleagues who question Dr. Moore's use of drugs or is under a mental aberration. Dr. Moore: I have found recently that I have a hypoglycemic condition. I also know that I do have a personality problem. In my Army 201 file I have records both good and bad occurring

simultaneously. Dr. Moore then presented a lab slip dated 6-24-69 showing a blood sugar series.

Dr. Moore then continued to state that he does have an uncontrollable temper, however, that he normally will apologize to the nurses at the hospital. Dr. Hines then stated that he would like to bring up some other facts that we are to consider in this case. The first is, previous incidents that have brought Dr. Moore's attention before the Medical Staff and also Dr. Hines wished to point out that the final power rested with the Board of Trustees as to whether he should be removed or not. Two copies of past meetings were passed around. The first was that of an Executive committee meeting that occurred April 6, 1966. Dr. Hines then added that he felt that a man's record is most important in considering an action, such as the nature of this. In referring to the April 6, 1966 meeting Dr. Hines pointed to a paragraph that stated "Dr. Moore stated it would be definitely understood that if his actions again became such that the Medical Staff Action had to be taken, it would mean automatic resignation or suspension". The second meeting passed around was an extract from the Special Executive Committee meeting of February 14, 1969. That was passed by the Staff February 17, 1969. Dr. Hines specifically called attention to paragraph number five that stated: "It is strongly recommended that any further misconduct on the part of Dr. Moore which is deemed to constitute unprofessional conduct by a majority of the Medical Staff so calls for the automatic, immediate, and permanent removal from the Medical

Staff and a recommendation to the Board of Trustees that the privileges of Dr. Moore be totally and permanently revoked". Dr. Hines then asked if there was any further discussion. Dr. Grundy then stated that he felt that the incident that occurred regarding the automobile action occurred a reasonable time both before and after anytime that Dr. Moore had occasion to be at the hospital, and that it should not be taken into consideration at this meeting. Dr. Hines stated I disagree with you, when such a grave decision is involved. Dr. Hines then asked Dr. Moore when did you come up to the hospital? Dr. Moore responded I came up to the hospital to do the circumcision. Dr. Grundy then stated I am sorry I retract the preceding. Dr. Harper then stated: When the glucose tolerance test was taken was this in relation to any incident. Dr. Moore: No. Dr. Fulper then requested the floor and stated "While only a probationary member of the hospital, I am allowed to have patients in the hospital. I would like to render an opinion. Putting it bluntly I feel Dr. Moore is ill and when such a time as he has recovered he should be reconsidered for practice on this hospital. I cannot see how we can allow a man to endanger the health of patients in this hospital. Mr. Martillaro then stated that from a legal standpoint all past statements have been subjective.

Following this there was a period of open discussion by several members simultaneously including Dr. Fulper, Dr. Brown and others. Dr. Ross then pointed out in answer to Mr. Martillaro it must be recognized that each individual point is not a separate entity but must

be considered in the whole picture. Dr. Harper then stated: I feel this is more than a subjective observation when two colleagues stop a fellow man from doing surgery. Mr. Martillaro then asked when Dr. Moore arrived was he articulant? Was there odor of alcohol? Was there any obvious use of drugs? And other questions of this nature. Dr. Harper then stated: Do you want to crawl up on a table if you have to be *questioned,* if the M. D. is surgically competent. Mr. Martillaro answered of course not. Dr. Hines then stated: Carl, this is a medical staff meeting not a court of law, it is a physician's meeting and you may have your opportunity in a court of law. Mr. Martillaro then asked is the Carson Tahoe Hospital now a public hospital? Mr. Allison answered yes. Dr. Hines then asked Dr. Moore, do you feel that you were competent to do the surgery Tuesday morning. Dr. Moore answered yes. Dr. King stated that there was some question in his mind and that he had people standing by in case of necessity.

It was pointed out that since the surgery was not done, not because of the incompetence of any physician, but because the patient had eaten. It was pointed out that it was the decision of the Chief of Staff that Dr. Moore was not able to do surgery at the originally scheduled 8:00 time. Dr. Stewart then requested the floor. He stated: I feel this is a meeting of physicians and not of lawyers. I feel that a man must speak up on his principles and a man who does not speak up is a coward. It is a fact that George has come before the Executive Committee

time and time again. I do not feel that George is well. I feel that George can be helped. Also there is on the last minutes that George has paroxysmal tacchycardia. I am speaking medically. I feel something is wrong with George. Or something is wrong with us. George has stated to us that he is not a well man. I am asking you as physicians, is he a well man? This has happened repeatedly over the last five years. We feel that only a physician can police another physician. I do feel that due to the fact that George Moore had repeatedly become before this group within the last few years that something must be done about Dr. Moore. I want to help George. Dr. Hines then requested follow-up action on the motion of the Executive Committee. Dr. Grundy then requested that Dr. Moore have no vote and a roll call vote be made. Dr. Hines stated that before he would rule this he would ask the two attorneys if Dr. Moore had a right to vote. Mr. Allison stated that as he is at the present time a full and active member of the staff he should have a vote. Mr. Martillaro agreed. Dr. Moore then stated that before I vote I will categorically state that I will undergo any physical or mental examination by any facility properly trained to so do. The next question then arose whether or not this was an open meeting. It was then pointed out that permission had specifically been granted by the Chief of Staff for the attendance of Mr. Allison and Mr. Martillaro. After considerable discussion concerning parliamentary procedure it was then moved by Dr. Harper that the Medical Staff recommend to

the Board of Trustees that George Moore be removed from the Medical Staff. This was seconded by Dr. Grundy. In an ensuing discussion Mr. Allison pointed out that the recommendation should include the grounds. Therefore, Dr. Harper amended the above motion to read that, the Medical Staff recommended to the Board of Trustees that Dr. Moore be removed from the Medical Staff on the grounds of unprofessional conduct. This was seconded by Dr. Grundy. Dr. Stewart then stated that before the vote was taken he would personally recommend that Dr. Moore be suspended until such a time that he is fully able to practice medicine. This position was endorsed by Dr. Ross and Dr. Collier. Following this a roll call vote was taken. The vote was taken by name and in order of seating was: Dr. Brown: For, Dr. King: For, Dr. Schieve, For, Dr. Grundy: For, Dr. Sewart: Against, Dr. Petty: For, Dr. Harper: For, Dr. Grundy: For, Dr. Ross: Against, Dr. Moore: Against, Dr. Collier: Against. The motion therefore stood at 7 for and 4 against. The Chief of Staff did not vote. The Chief of Staff announced that the motion had passed and the meeting was therefore adjourned.

Appendix B

(Letterhead of
Carson-Tahoe Hospital
County of Ormsby
1201 North Mountain Street
Carson City, Nevada 89701
Phone Area Code 702 882-1361)

July 31, 1969

To: Carson Tahoe Hospital Board of Trustees
From: T. K. Hines, M.D., Chief of Staff

The Medical Staff of the Carson Tahoe Hospital recommends to the Board of Trustees of the Carson Tahoe Hospital that the staff privileges of George L. Moore, M.D. be immediately terminated, due to unprofessional conduct.

Sincerely,
/s/ T. K. Hines, M. D.
Chief of Staff

Appendix C

In the United States District Court
for the District of Nevada

Civil No. R-2670

George L. Moore,
Plaintiff,

vs.

William E. Schultz, William A. Young, L. Gene Gold, Joseph N. Littlefield, Mary O. Knapp and William R. King, individually and as the Board of Trustees of Carson-Tahoe Hospital, and Does 1 through 25,
Defendants.

[June 28, 1972]

ORDER DISMISSING ACTION

This is an action under the Civil Rights Act, 42 U.S.C. §1983, seeking a decree abrogating a decision of the Board of Trustees of Carson-Tahoe Hospital which had terminated plaintiff's privilege to use the hospital as a member of the hospital staff. Plaintiff contends that the law and regulations providing for discipline for "unprofessional conduct" are unconstitutionally vague and indefinite and do not comport with due process standards.

The identical claim under the identical record was presented to the Supreme Court of Nevada, *Moore v. Board of Trustees, et al,* 88 Nev. ....., 495 P.2d 605, and was decided adversely to plaintiff.

The final judgment of the Nevada Supreme Court is res judicata and this Court has no jurisdiction to reconsider and redetermine issues of fact and law which have been finally adjudicated by a state court of competent jurisdiction.

In *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923), the Court said:

> "It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject matter and the parties; that a full hearing was had therein; that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the State on an appeal by the plaintiffs. 191 Ind. 141. If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. Elliott v. Peirsol, 1 Pet. 328, 340; Thompson v. Tolmie, 2 Pet. 157, 169; Voorhees v. Bank of United States, 10 Pet. 449, Cornett v. Williams, 20 Wall. 226, 249; Ex parte Harding, 120 U.S. 782."

In *England v. Medical Examiners,* 375 U.S. 411 (1964), the Court said:

> "We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forgo his right to return to the District Court."

The *England* case involved federal abstention to permit prior consideration by the state court of a controlling question of state law. There the action had initially been properly commenced in the federal court. If the doctrine of res judicata applies in that circumstance, *a fortiori* it must apply where the issues of fact and law were first presented and prosecuted to final judgment in the state court system. See, also: *Brown v. Chastain,* 416 F.2d 1012 (5th Cir. 1969); *Rankin v. Florida,* 418 F.2d 482 (5th Cir. 1969).

It Hereby Is Ordered:

1. The restraining order heretofore issued is hereby dissolved.

2. The action entitled above is hereby dismissed.

Dated: June 28, 1972.

/s/ Bruce R. Thompson
United States District Judge.

Appendix D

In the United States District Court
for the District of Nevada

Civil No. R-2670

George L. Moore,
Plaintiff,

vs.

William E. Schultz, William A. Young, L. Gene Gold, Joseph N. Littlefield, Mary O. Knapp and William R. King, individually and as the Board of Trustees of Carson-Tahoe Hospital, and Does 1 through 25,
Defendants.

[July 11, 1972]

NOTICE OF APPEAL

Notice is hereby given that George L. Moore, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on the 28th day of June, 1972.

Dated this 11th day of July, 1972.

/s/ Carl F. Martillaro
Carl F. Martillaro,
Attorney for Plaintiff
308 North Curry Street
Carson City, Nevada 89701

Appendix E

No.

United States Court of Appeals
For the Ninth Circuit

George L. Moore, Plaintiff-Appellant, vs. William E. Schultz, William A. Young, L. Gene Gold, Joseph N. Littlefield, Mary O. Knapp, and William R. King, individually, and as the Board of Trustees of Carson-Tahoe Hospital, Defendants-Appellees.	Civil No. R-2670

RECORD ON APPEAL

From the _____ District of Nevada

Record in _____ Volumes

Clerk's Record (Pleadings) in I Volumes (Volume I of Record) Reporter's Transcript in O Volumes

Hon. Bruce R. Thompson, Trial Judge

Names and Addresses of Attorneys of Record

For Appellant:
Carl Martillaro, Esq.
308 N. Curry St.
Carson City, Nv 89701

For Appellee:
Michael Fondi, District Attorney
P. O. Box 2998
Reno, Nv 89505

Laxalt, Berry & Allison
Attorneys at Law
P. O. Box 646
Carson City, Nv 89701

Transmitted to the U. S. Court of Appeals
For the Ninth Circuit on August 9, 1972
Volume I